

G311mtbc

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 In re MTBE

00-CV-1898 (SAS)

4 Conference

-----x

5 New York, N.Y.

6 March 1, 2016

5:18 p.m.

7 Before:

8 HON. SHIRA A. SCHEINDLIN,

9 District Judge

10 APPEARANCES

11 For Plaintiffs:

12 JOHN GILMOUR, ESQ.

13 For Defendants:

14 JAMES PARDO, ESQ. (Liaison)

15 LISA GERSON, ESQ. (Liaison)

16 PETER CONDRON, ESQ. (Shell defendants)

ALBENIZ COURET, ESQ. (Total Petroleum Puerto Rico Corp.)

17 DANIEL KRAININ, ESQ. (Sunoco defendants)

ROBERT WILSON, ESQ. (Idemitsu Apollo Corporation)

18 For Defendants, Observing by Phone:

19 JAMES HARRIS, ESQ. (Petrobras)

20 JEREMIAH ANDERSON, ESQ. (Chevron defendants)

ALEJANDRO CEPEDA DIAZ, ESQ. (Sol)

PAMELA HANE BUTT, ESQ. (CITGO International Puerto Rico)

21 JESSICA FARLEY, ESQ. (ConocoPhillips Co., CP Chem PR Core)

G311mtbc

1 THE COURT: Good afternoon, Mr. Gilmour?

2 MR. GILMOUR: Good afternoon, your Honor.

3 THE COURT: Good afternoon, Mr. Pardo.

4 MR. PARDO: Good afternoon.

5 THE COURT: Ms. Gerson?

6 MS. GERSON: Good afternoon.

7 THE COURT: Mr. Condron?

8 MR. CONDRON: Good afternoon.

9 THE COURT: Mr. Krainin?

10 MR. KRAININ: Good afternoon.

11 THE COURT: Mr. Couret?

12 MR. COURET: Good afternoon.

13 THE COURT: Mr. Wilson?

14 MR. WILSON: Good afternoon.

15 THE COURT: Okay. Well, for those of you who are on
16 the phone, I explained to the others the late arrival was due
17 to a court ceremony in memory of Judge Patterson and it went
18 longer than expected.

19 Is there a Mr. Harris on the phone?

20 MR. HARRIS: Yes, your Honor.

21 THE COURT: Mr. Anderson?

22 MR. ANDERSON: Good afternoon, your Honor.

23 THE COURT: Mr. Diaz? Is there a Mr. Diaz? No.

24 MR. CEPEDA: Yes. Cepeda, yes.

25 THE COURT: Yes. Ms. Hanebutt?

G311mtbc

1 MS. HANE BUTT: Good afternoon.

2 THE COURT: Ms. Farley?

3 MS. FARLEY: Good afternoon, your Honor.

4 THE COURT: And Mr. Bollar. Is there a Mr. Bollar
5 still on the phone? No.

6 Okay. Getting right down to it, after this somewhat
7 lengthy delay, I have two letters here. They're both dated
8 February 26th. I don't think they respond to one another. I
9 suspect they were submitted pretty much simultaneously.

10 MS. GERSON: Your Honor, it may help to just clarify
11 one or two things in the letters that came in, and that's that
12 defendants are not opposing inclusion of Total 1012. I just
13 wanted to explain, that's been resolved.

14 THE COURT: That's good. In any event, there are
15 these two letters. There is a letter from Mr. Pardo on behalf
16 of defendants and there's a letter from Mr. Gilmour on behalf
17 of plaintiffs. And the letters dispute the terms, the language
18 to be used in the suggestion of remand that both sides say is
19 the next step in the Puerto Rico litigation.

20 So with one of those issues out of the way, the Total
21 site, I will confess that I only read these letters once and
22 figured I would just go through them again here.

23 So according to plaintiff's letter -- and I hope it's
24 the same as the defense letter -- the first topic is how to
25 phrase whether discovery is complete. And defendants' proposed

G311mtbc

1 language includes the phrase, "The trial sites are being
2 remanded to the District of Puerto Rico for further pretrial
3 proceedings and a Phase I trial." And the plaintiff's proposed
4 language is that they're being remanded "for further
5 proceedings including a Phase I trial." So the missing phrase
6 seems to be for further pretrial proceedings.

7 I don't really think that there's a need to argue. I
8 will tell you what I think, and then if you feel you have to be
9 heard, so be it.

10 I don't see how the defendants can be anything but
11 right. There's always further pretrial proceedings. You can't
12 go to trial without pretrial proceedings. There are endless
13 motions *in limine*, there are endless objections to exhibits
14 that can be made. There's never a case that doesn't have
15 further pretrial proceedings. If you feel that that opens the
16 door to permanent discovery, I understand your concern, but I
17 think that one has to trust that the judge understands what is
18 meant here, that classic discovery is finished but there are
19 times when one has to update something. I gather it's
20 somewhere in this letter. I think I read that the defendants
21 may have to update testing data or something, and because one
22 needs to have the most current version. But there's always
23 pretrial matters, and if I were to have gotten every pretrial
24 matter out of the way to make it trial ready, I would have had
25 to do, as I said, all the motions *in limine* and all the

G311mtbc

1 evidentiary objections, then say to a judge: You're ready to
2 pick a jury. Here's the package. So I don't think the phrase
3 is dangerous, especially with this transcript. The only thing
4 that I can leave open is that for example, the defendants may
5 exchange updated trial site detection data and I already
6 mentioned motions *in limine*.

7 You are?

8 MR. WILSON: Robert Wilson for Idemitsu.

9 THE COURT: What is it, Mr. Wilson?

10 MR. WILSON: I'd like to raise a point about the
11 completion of discovery by Idemitsu. As your Honor may recall,
12 back in December of 2013, your Honor granted summary judgment
13 to Idemitsu based on statute of limitations grounds, and in
14 reliance on that decision, Idemitsu did not participate in the
15 subsequent expert discovery and motion practice that pertained
16 to the Total 1012 site. And we understand from the submissions
17 that plaintiffs intend to appeal the summary judgment that was
18 granted as to the Total 1012 site at some point. If that
19 summary judgment is reversed, Idemitsu will be back into the
20 Total 1012 trial, and so we would like to undertake expert
21 discovery at that point.

22 THE COURT: You mean postreversal by an appellate
23 court? Life's too short for me to see two to three years in
24 the future. When and if that happens, I'm sure you'll ask the
25 trial judge. You'll explain the history you've just explained,

G311mtbc

1 you'll say, we were suddenly successful in the First Circuit,
2 it took two years to be successful, we never participated in
3 expert discovery, please allow us to do so. I'm sure the judge
4 will do the right thing at that time. There's nothing for me
5 to say. I want to just get the language of this down, and I
6 think the defense language covers the issue together with this
7 transcript. I'd like to move on to the second issue.

8 MR. WILSON: Thank you, your Honor. We just want to
9 make sure there's nothing in the remand order that would
10 prevent us from doing that. Thank you.

11 THE COURT: What is it, Mr. Gilmour?

12 MR. GILMOUR: Your Honor, if I may, the plaintiff's
13 concern was not the phrase "pretrial." We concede that further
14 pretrial proceedings will have to happen. The issue, as I told
15 defendant's counsel, is posttrial proceedings or during trial.
16 It's no mystery, your Honor, that we intend to seek review in
17 the First Circuit. We are going to seek either a Rule 54(b)
18 judgment or postentry of judgment, posttrial. That has been
19 the concern.

20 THE COURT: Wait a minute. What does that have to do
21 with the language of the phrase that I read into the record?
22 What would you change?

23 MR. GILMOUR: I would add "posttrial proceedings" at
24 the end of that.

25 THE COURT: But that's obvious.

G311mtbc

1 MS. GERSON: And we agree.

2 THE COURT: Completely obvious. There are always
3 posttrial proceedings.

4 MR. GILMOUR: Yes, your Honor, and that was our
5 response when they added pretrial. Originally it was
6 proceedings, and when they added pretrial, we said, well,
7 that's obvious, and it's included in the proceedings, and the
8 response was no, we must have pretrial in the order.

9 MS. GERSON: Your Honor, we're fine with posttrial
10 included, and it's in our letter.

11 THE COURT: All right. That seems to be resolved.
12 So, well, maybe there's only one other issue. Because the
13 so-called second issue in the defense letter, does that relate
14 solely to the Total 1012 sites? Mr. Pardo, you wrote the
15 letter.

16 MS. GERSON: Your Honor, I'll take that. Sorry.

17 THE COURT: Okay.

18 MS. GERSON: The second issue was, we believe that
19 there is a reference to CMO 117 in the remand order and both
20 parties agree to that. We also believe that there should be
21 language recognizing that after CMO 117, there was a
22 stipulation, opinions by your Honor that affect the current
23 state of the case as it's being sent back.

24 THE COURT: The defendant's proposal is following
25 these various stipulations, motion practice, and court orders,

G311mtbc

1 "The main Phase I trials are."

2 MS. GERSON: Actually, I don't know if that is as much
3 in dispute as the following. It continues CMO -- that the
4 Phase I trial shall be consistent with CMO 117 and with the
5 Court's above-referenced summary judgment ruling. I think that
6 might be more of the issue in dispute. But we obviously think
7 that the district court and the panel should be aware that
8 postCMO 117, there were additional decisions.

9 THE COURT: That's covered. It says: Following these
10 various stipulations, motion practice, and court orders. What
11 else is my summary judgment opinion but a court order?

12 MS. GERSON: Well, it's a little bit different only
13 because the second sentence comes later in the order and it
14 addresses parties as well as claims as trial sites.

15 THE COURT: I'm not really following.

16 MS. GERSON: Sorry. If we look at the proposed order
17 attached to our letter -- and it's the very, very bottom of
18 page 2, which says that the proceedings, the remanded
19 proceedings, shall be consistent with CMO 117 and the
20 above-referenced summary judgment rulings. And that is --

21 THE COURT: Where is the other phrase about court
22 orders?

23 MS. GERSON: It's two sentences, the very, very top of
24 page 2 and the very, very bottom of page 2.

25 THE COURT: Well, such procedures shall be consistent

G311mtbc

1 with CMO 117 and with all of the court's orders.

2 MS. GERSON: That's what we're proposing, your Honor.

3 THE COURT: I don't see the difference. With all the
4 court's orders, includes my summary judgment opinion and now
5 that's clear from this transcript.

6 MR. GILMOUR: Yes, your Honor, and to be clear, as
7 we've consistently said, we agree that your Honor's orders
8 modified the CMO 117 as they currently stand and that that is
9 the posture of the case right now.

10 THE COURT: That's fine. So "to be consistent with
11 CMO 117 and with all of the court's orders." That's it.
12 Between that and this transcript, that certainly covers the
13 summary judgment.

14 Now we have the last topic, according to defendants'
15 letter. Finally, defendants' proposal includes language that
16 was used in New Jersey, that discovery has been substantially
17 completed.

18 MS. GERSON: I believe you addressed that, the
19 substantially completed discovery. That related to
20 supplementing.

21 THE COURT: So is there anything left?

22 MS. GERSON: The only thing, your Honor, is actually
23 the first point in our letter, plaintiff told us on Friday they
24 wanted to delete out a couple of footnotes, particularly
25 footnote 3. This was a footnote that was included similarly in

G311mtbc

1 New Jersey and it basically states the defendant that -- for
2 which claims are remaining at the trial site, it clarifies we
3 believe which parties must participate in the trial.

4 THE COURT: You say "clarify the identity of the
5 defendants required to participate in the remanded Phase I
6 proceedings." Where does the plaintiff's letter address this?

7 MR. GILMOUR: Your Honor, we deleted the footnote.

8 THE COURT: I know. You must have written about it in
9 your letter, did you?

10 MR. GILMOUR: No, your Honor, because I was not aware
11 that this was an issue.

12 If I may clarify, your Honor, this was raised for the
13 first time after defendants took a "take it or leave it" stance
14 on the Total 1012 site until this past Friday, which you may
15 remember, your Honor, was three days past the deadline you gave
16 us to advise the Court of whether we had made any progress, and
17 our letters were due that same afternoon. Ms. Gerson called me
18 in the afternoon and said: Do you want to discuss these
19 issues? And I said of course. I'm always open to discussion.
20 There was a discussion about Total 1012 which required me to
21 talk to another defense counsel and then get back to Ms. Gerson
22 in the middle of the afternoon, at which time she told me for
23 the first time ever that defendants no longer were opposed to
24 Total 1012 going back, and up until that point defendants had
25 refused to address any of this language because of all bore on

G311mtbc

1 the Total 1012 site, from our perspective. So to say that, you
2 know, we have laid behind the law or not addressed it is very
3 concerning, which some of the first language in their letter
4 says that we never --

5 THE COURT: Well, I don't care about that. I just
6 care about hammering out the language, signing the document,
7 and sending it out the door. I don't really want to know who
8 is a good guy or bad guy or somewhere in between. I just want
9 to finish.

10 So in footnote 3, which apparently clarifies the
11 identity of the defendants required to participate in the
12 remanded Phase I proceedings, what's the problem with it?

13 MR. GILMOUR: It leaves out the dismissed defendants
14 for whom we are going to appeal, who need to go back with the
15 sites.

16 THE COURT: Oh. Only if you ever win on the appeal.

17 MR. GILMOUR: And if those defendants want to
18 participate in the appeal, yes, your Honor, I agree.

19 THE COURT: So now it says: "Footnote 3. Due to
20 settlements, stipulations, and rulings that occurred after
21 entry of CMO 117, the only defendants whose liability, if any,
22 will be determined at and that are required to participate in
23 the remanded Phase I proceedings are:" I suppose at the end of
24 that, you could add a sentence, "If at any time there is a
25 reversal and other defendants who were dismissed are

G311mtbc

1 reinstated, that will be addressed when and if it happens."

2 MR. GILMOUR: Yes, your Honor, and I'm happy to work
3 toward the language.

4 THE COURT: That's the language. Get it out of the
5 transcript. That's it.

6 MR. GILMOUR: Yes, your Honor.

7 THE COURT: If you need to preserve it, go ahead and
8 say it, but I think we're done.

9 MS. GERSON: Thank you, your Honor.

10 THE COURT: So please, finalize this order, I sign,
11 and you are off and running for a trial. Maybe.

12 ALL COUNSEL: Thank you, your Honor.

13 THE COURT: Oh. When can you get this submitted to
14 the Court, please? I mean, with this transcript and these
15 rulings.

16 MR. PARDO: Friday.

17 THE COURT: I agree with you, Mr. Pardo. Close of
18 business Friday. Just write it up, and don't tell me you can't
19 agree on the language, because it's clear enough now.

20 All right? Thank you. Sorry for the delay.

21 ALL COUNSEL: Thank you, your Honor.

22 (Adjourned)